Hudson Oxygen Therapy Sales Company *and* Sales Drivers and Dairy Employees, Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 21-CA-20208

29 February 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 28 September 1983 Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt his recommendation that the Board reaffirm its Order issued in *Hudson Oxygen Sales Co.*, 257 NLRB 1193 (1981).

ORDER

The National Labor Relations Board reaffirms as its Order the Order set forth in *Hudson Oxygen Sales Co.*, 257 NLRB 1193 (1981).

[1] Member Hunter agrees that in all the circumstances the chanting outside the polling area preceding the election is insufficient to warrant setting aside the election. Member Hunter does not, however, adopt the judge's conclusion that as a "matter of law" the chanting could not be objectionable.

DECISION ON REMAND

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: On September 4, 1981, the National Labor Relations Board issued its original Decision and Order in this proceeding granting the General Counsel's Motion for Summary Judgment.[1] The Board found that the Respondent, Hudson Oxygen Therapy Sales Company (the Respondent), had committed unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by refusing to bargain with the Charging Party, Sales Drivers and Dairy Employees, Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Thereafter, the Board petitioned the United States Court of Appeals for the Ninth Circuit for enforcement of its order. On January 3, 1983, the court, in an unpublished order[2] denied enforcememnt and remanded the proceeding to the Board instructing it "to hold an evidentiary hearing on the company's objection." The Board accepted the remand and directed the Regional Director for Region 21 to arrange such a hearing. The remand was heard before me on August 16 and 17, 1983 in San Diego, California. Both the Respondent and the Petitioner filed briefs which have been considered.

The Election

Pursuant to a stipulation for consent election agreement the Regional Director, on October 3, 1980,[3] conducted a secret-ballot election in a voting unit described as follows:

> All production and maintenance employees, including shipping and receiving employees, duplicators, inspectors, truckdrivers, leadmen and nonexempt plant clerical employees employed by the Employer at its facility located at 27711 Diaz Street, Temecula, California; excluding salesmen, office clerical employees, guards, professional employees and supervisors as defined in the Act.

The voting unit consisted of approximately 593 employees. Due to the size of the voting unit and because the Respondent operated its plant on a three-shift basis, the election was conducted during the two-shift changes, enabling all of the employees an opportunity to vote. Of the entire complement 361 voted in favor of union representation, while 173 voted against. There was also an insignificant number of void and challenged ballots. After the election an official tally of ballots was issued. Thereafter by a document dated October 9, the Employer filed "Objections to Union and Board Conduct Affecting the Results of the Election." On October 30 the attorney representing the Respondent filed a handwritten letter attempting to add another objection to the first four which had been originally filed. On December 23, the Regional Director issued his report on the objections recommending to the Board that each of them be overruled. The Respondent filed timely exceptions to the Regional Director's report, but did not except to his conclusions with respect to Objection 4 and the supplement objection which had been made in the handwritten letter. The Board adopted the Regional Director's report and, on March 18, 1981, certified the Union as the exclusive representative in the above-described bargaining unit.

Scope of the Remand

Although the court's order directed the Board to hold an evidentiary hearing on the Company's objections, I concluded at the hearing and advised the parties that I did not deem the court's order to encompass Objection 4 or the supplemental objection. These matters were never before the Board on the Employer's exceptions to the Regional Director's report and, procedurally, they could not have been before the court.

[1] 257 NLRB 1193.

[2] Docket No. 81-7865.

[3] All dates are 1980 unless shown to be otherwise.

I advised the parties that I would hear evidence on the remaining Objections 1, 2, and 3.

The burden of proving the allegations set forth in the objections is, of course, on the objecting party, in this case the Respondent. Upon my asking the Respondent to proceed, its counsel advised me that he had no evidence to submit with respect to Objections 1 and 2. He did proffer testimony that a company official had made an effort to locate the witnesses who had observed the alleged misconduct, but had been unable to find them or to compel them to appear. It does not appear that the effort to locate these witnesses was extensive, consisting only of a few telephone calls shortly before the hearing. Objection 1 asserted that union representatives had threatened employees with bodily harm for opposing the Union during the election campaign. Objection 2 asserted that a union representative had attempted to inculcate fear in prospective voters by "threatening, belittling and disparaging the character of security guards as they protected Respondent's property." Although I interpreted the court's remand order as encompassing these two allegations, and was prepared to examine the circumstances surrounding them, the Respondent offered no evience relating to them.

The Respondent did offer evidence on Objection 3, in essence, a two-part objection. The first portion asserts that the Board agents conducting the election created the impression of partiality by permitting union representatives to be present in the lunchroom used as a polling place at a time when company representatives were not present. Further, it asserts that the union representatives took advantage of the situation by engaging in active electioneering among employees in the vincinity.

The Facts

As noted previously the election was conducted on October 3. It was in two parts. The first polling period was 5:45 to 7:45 a.m. and the second period was 2:45 to 4:15 p.m. By this device employees of all three shifts would have an opportunity to vote, not only between shift changes, but by virtue of overlaps and releases from work as well. There were three Board agents who conducted the election. They were Peter Tovar, Jack Schlumberger, and Hortencia Montes. Tovar appears to have been the Board agent in charge.

As usually occurs before an election a preelection conference was conducted. It took place in a company office at approximately 5:15 a.m. All three Board agents were present as were several company and union officials. Also in attendance were 9 or 10 employees which each party had selected as observers for the morning polling period. The Union had additional employees who were scheduled to observe the afternoon polling period but they did not attend.

At the conference Tovar explained the mechanics of the election and the duties of the observers. He required the parties to synchronize their watches and told both the management and the union officials that they were not to be present in the polling place while the polls were open. He explained how the alphabetized list of voters was to be handled, told the observers not to talk either to each other or to the voters. He explained how the ballot box would be inspected and sealed at the end of the morning session.

Tovar also gave some instructions regarding the appropriate time for the observers to appear for the afternoon session. The testimony regarding what he said is in dispute. Two of the Employer's observers, Harp and George, testified that Tovar told the group that "only the observers" were to return at 2:30. The Employer's personnel manager, Rayona Bremner, testified at first that she had not been told that she could return to the lunchroom at 2:30. Later she testified that Tovar "made a very definite statement that at 2:30, the observers—and only the observers—were to report at 2:30 up in the voting area." All three testified that Tovar repeated the instruction again when everyone arrived in the lunchroom at approximately 5:35 a.m.

Union officials Carole Cook and Pete Espudo testified to the contrary. They both said Tovar simply told the observers to return to the lunchroom at 2:30. Neither recalled Tovar giving any directive prohibiting the representatives of the parties from appearing in the lunchroom at that time. Both Cook and Espudo have attended numerous preelection conferences and each testified that an instruction such as that reported by Harp, George, and Bremner would have been very unusual and would have stood out in their minds. Both testified that it is quite common during split elections for the representatives of the parties to appear in the area to be used as a polling place shortly before voting resumes to inspect the ballot box and to confer with the employees who have agreed to act as their observers.

The morning session went smoothly. The ballot box was sealed and signed by some of the observers and the Board agents took possession of it for the hiatus period. As they were leaving the lunchroom, Cook appeared on the scene and noted to one of the Board agents that they had already sealed the box and appeared to be done. Cook said she would "see them at 2:30." She then left. She says no Board agent told her she could not do so.

At 2:30 both Cook and another union representative, Emelio Flores, entered Respondent's property and went to the lunchroom. They were followed by a uniformed security guard. Later a plainclothes security guard entered the room. The guards were employed by an independent guard service, not by the Respondent as asserted in its brief. Although the evidence is in some conflict, it appears that Cook sat at a table where the employees who were to serve as afternoon observers immediately gathered. At least two had not attended the morning preelection conference. Flores did not participate in the conversation, but stood by the table. Cook confered for a few minutes with the observers and, at the invitation of Board agent Montes, inspected the ballot box. One company observer had previously checked it. Both Cook and Flores testified that they left approximately 2 minutes before the polls were to open. They testified that neither heard nor observed any unusual activity during their presence. Cook says she did observe a few employees in the lunchroom using the vending machines or sitting at tables. She said she did not speak to any of them.

Company observers Harp and George had also arrived at 2:30. They noticed that the stairwell from the first floor to the second floor lunchroom was beginning to fill up with employees wishing to vote. Although only a few were actually in the lunchroom they said a large number quickly gathered. While they waited some began to chant, "Vote Yes, Vote Yes." They both observed a Hispanic male whom they identified as Espudo join the chanting and heard him say, "Vote Yes, Vote Si."[4] Harp immediately left the lunchroom and entered a small office on an adjacent hall. From there she called Personnel Manager Bremner who immediately came to the lunchroom.

While Bremner was making her way from her office to the lunchroom, Board agent Tovar took command of the situation and, although it took him approximately three shouted directions, he quieted the crowd. No further outbursts occurred. In the meantime, Bremner arrived, saw "Espudo" and Cook leaving and demanded to know what they were doing in the lunchroom when she was not. Tovar did not reply, apparently because the polling time had arrived. He asked her to leave and she did so. The polls then opened.

In addition to this episode, two other incidents occurred. One voter remained in the voting booth an unusually long time. One of the company observers, thinking something improper was occurring, attempted to call it to the attention of one of the Board agents. Before she could do so, the voter left the booth, deposited his ballot in the box, and then gloatingly said, "Yes, yes, yes!" as he left the voting area.[5] The other incident involved two female employees who were heard to be speaking to each other in Spanish as they voted. It is not clear whether they entered the same voting booth or were in adjacent booths. There is no evidence regarding the subject of their conversation. A Board agent almost immediately admonished them not to talk.

Analysis and Conclusions

The first portion of Objection 3 asserts that the Board agents' conduct created the impression of partiality. The conduct complained of is that they apparently permitted two union officials, Cook and Flores, to be present in the lunchroom for about a 10-minute period before the afternoon polling session began, after having given instructions to the effect that "only observers" were to report to the lunchroom at that time.

In this posture, I can assume that the testimony of Harp, George, and Bremner was truthful and ought to be credited. But even if I do, what is it that the Board agents did which created the impression of partiality?

Under this scenario Board agent Tovar issued a directive that only the observers were to return at 2:30 but the union officials failed to heed it. First, the only persons who heard the instruction were the persons who were present at the preelection conference and, by extension, in the lunchroom shortly before the polls opened in the morning when the statement was supposedly repeated. No other employees ever heard it nor could they have known that it had been violated. I suppose I might concern myself with the impact it may have had on those voters who served as observers, for they apparently knew the directive had been breached. Even so, there is no evidence that it affected the way in which they voted. No observer testified regarding what time he or she voted and so there is no evidence regarding how it could have influenced them. If they had voted in the morning, as is likely, it would have been before the incident occurred and it therefore could not have swayed them.

Also under this scenario, it appears that shortly before the afternoon polls opened there were between 10 and 15 employees present in the lunchroom. Whether they were aware of the union officials' presence is unclear. Yet, the Respondent has made no showing that the presence of Cook and Flores, who performed the legitimate tasks of conferring with their observers and viewing the seal on the ballot box, presented the Board agents as publicly favoring union representation.[6]

In these circumstances, it cannot be said that the Employer has carried its burden of proof with respect to its contention that the Board agents, in permitting union officials to be present in the lunchroom before the polls opened, demonstrated partiality and created grounds for setting aside the election. Recently, the Board has said in *Newport News Shipbuilding Co.*, 239 NLRB 82, 91 (1978):

> We must avoid unrealistic standards which insist on improbable purity of word and deed on the part of the parties or Board agents. Otherwise, in any hard-fought campaign involving a large number of voters, it would be impossible to conduct an election which could not be invalidated by a party disappointed in the election results. [Footnote omitted.]

In considering that admonition, a common sense rule of practicality and fairness, I can see nothing which happened here which could reasonably cause one to conclude that the Board agents created the impression of partiality. Such a rule is certainly consistent with the effort to obtain "laboratory conditions" as hoped for by the Board in *General Shoe Corp.*, 77 NLRB 124 (1948), even if the laboratory conditions are not perfect.[7]

With respect to the second contention, that union officials and employees engaged in electioneering, a similar conclusion must be reached. It is true that the evidence is in conflict with respect to what the Hispanic union of-

[4] Espudo was not present. To the extent that Flores and Espudo may be characterized as similar in appearance, such a description would be misleading. Although of similar age, weight, and coloration, their facial appearance is quite different. Flores has a mustache; Espudo does not. Moreover Flores' face is leaner than Espudo's.

[5] The observer seems to think that the voter's abnormal stay in the voting booth warranted his ballot being challenged. That, however, is manifestly not the case. Challenges are made when the voter identifies himself or herself to the Board agent to obtain a ballot.

[6] Not only does there appear to be some confusion with respect to the witness who identified the union representatives, misidentifying Flores as Espudo, it appears they may also have mistaken the plainclothes security guard as another union official. To the extent that they misidentified union officials any misapprehension or confusion can hardly be laid at the feet of the Board agents.

[7] See also *Sioux Products v. NLRB*, 703 F.2d 1010 (7th Cir. 1983).

ficial did or did not do during those 10 minutes. Flores' testimony that he simply stood behind Cook as she conferred with the afternoon observers certainly seems probable. He had no specific duties to perform, aside from generally looking over the situation and offering his assistance to Cook if she needed it. His testimony is corroborated by her. However, there is the testimony of the two observers, Harp and George, to the effect that potential voters standing in the stairwell as well as a few employees in the vending machine area began to chant "Vote Yes."[8] In that circumstance it does not seem unlikely that a union official might well take advantage of the exuberance of the moment and join in. Indeed, even employee, as opposed to party, electioneering at or near a polling place has been held to be grounds for setting aside an election. *Claussen Baking Co.*, 134 NLRB 111 (1961).

However, all this conflict ignores one central and very important fact. The polls had not yet opened. Indeed all the witnesses testified that the polls had not opened at the time of the chanting. Moreover, all witnesses agreed that Board agent Tovar quickly quelled the outburst and it ended before the polls were declared to be open. Thus, whatever the facts are with respect to electioneering in this incident, as a matter of law the lunchroom was still a lunchroom; it was not a polling place at the time the chanting allegedly took place. In *General Steel Tank Co.*, 111 NLRB 222, 224 (1955), the Board stated: "In the interest of maintaining a free and untrammeled election, the Board has adopted the policy of prohibiting electioneering within a specified area near the polls *while the voting is in progress.*" (Emphasis supplied.) In that case a plant guard, on behalf of the employer, distributed leaflets a short distance from the polling place before the polls opened. In the absence of evidence that the guard distributed the leaflets at a time when the polls were open the Board overruled the objection. The instant case so closely tracks the facts of *General Steel Tank* that I find myself bound by its holding. Despite any credibility conflict with respect to whether the chanting actually occurred, I find that if it did occur it ended before the polls opened. Accordingly, as a matter of law it cannot constitute objectionable conduct.[9]

Finally, the incident in which a voter left the polling area saying, "Yes, yes, yes" appears insignificant in the overview. Over 500 employees voted in the election and, assuming that his statement constituted electioneering, it could not have affected the outcome of the election even if 15 or 20 voters heard him. Isolated incidents of this sort do occur, are unfortunate, but cannot be fully controlled. Nonetheless they generally do not affect the laboratory conditions which would otherwise be maintained.[10] Similarly the incident in which two women voters were speaking Spanish to each other while in or near the voting booth is also insufficient grounds to set the election aside. There is no evidence regarding what they said to each other. It is possible that one was electioneering the other, but it is equally possible that they were discussing the mechanics of voting or even any other topic. It would be sheer speculation to assume that this conversation involved electioneering. Certainly neither incident could have affected the outcome given the large margin favoring the Union.

I conclude therefore that Objection 3 is without merit. As no evidence has been presented in support of Objections 1 and 2. I conclude that the Respondent has failed to meet its burden of proof with respect to them as well. Accordingly, I make the following

RECOMMENDATION

Upon the foregoing findings, pursuant to the remand orders of the United States Court of Appeals for the Ninth Circuit and the Board, I recommend that the Board reaffirm its remedial order issued in *Hudson Oxygen Sales Co.*, 257 NLRB 1193 (1981).

[8] A curious feature regarding the chanting incident is that no person who was present when it supposedly happened ever gave an affidavit regarding it. This is true both of company observers as well as the two security guards whose affidavits are attached to the Employer's exceptions to the Regional Director's report on objections. Perhaps both the company attorney and the Board investigator who took them recognized that the incident was not legally objectionable as the polls had not opened and pursuit of the matter was a waste of time. Was the incident ever before the Board or the court in the first instance?

[9] See also *Cumberland Nursing Center*, 248 NLRB 322 (1980) (no evidence that polls were open at time of conversations said to be electioneering), and *Lincoln Land Moving & Storage*, 197 NLRB 1238, 1239 (1972) (polls not open).

[10] *Newport News Shipbuilding*, supra.